

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR DANIEL ARUIZU,

Defendant and Appellant.

D074148

(Super. Ct. No. SCN383576)

APPEAL from a judgment of the Superior Court of San Diego County, Carlos O. Armour, Judge. Affirmed.

Pauline E. Villanueva, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Victor Daniel Aruizu (also known as Hector Macedo Arvizu) of possession of a controlled substance for sale (Health & Saf. Code, § 11378) and found

true the allegation that the substance contained methamphetamine and weighed more than 57 grams (Pen. Code, § 1203.073, subd. (b)(2)). The jury also convicted Aruizu of resisting an officer. (*Id.*, § 148, subd. (a)(1).) The trial court sentenced Aruizu to a total term of two years in jail.

Aruizu appeals. He contends the court erred by admitting testimony that police officers first contacted Aruizu based on information that a person meeting his description was involved in "narcotics activity" in the area. Aruizu argues this testimony was inadmissible under state evidentiary law because it was hearsay, not relevant to any issue in dispute, and substantially more prejudicial than probative. He also argues its admission violated the Sixth Amendment's Confrontation Clause. We conclude any error under state law was harmless, and Aruizu has not established a federal constitutional violation. We therefore affirm.

FACTS

For purposes of this section, we state the evidence in the light most favorable to the judgment. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Additional facts are discussed where relevant in the following section.

On February 25, 2018, two police officers responded to a report of a Hispanic male with a German Shepherd dog involved in "narcotics activity" in an area of Carlsbad, California. When they arrived, they contacted Aruizu, who fit that description. Aruizu was initially cooperative, but he began to walk away when his dog lunged at the officers. The officers told Aruizu to stop, but he sped up and began to run. Aruizu took a black

object out of his pocket and shoved it into some ivy. The officers drew their handguns and repeated their command to stop. Aruizu complied, and the officers placed him in handcuffs. They retrieved the black object, which turned out to be a black tool pouch containing five bags of methamphetamine. Forensic analysis of the bags revealed approximately 145 total grams of a substance containing methamphetamine, with a street value of over \$4,410.

The officers arrested Aruizu. They searched his person, which yielded almost \$500 in cash, a key chain, and a business card for a public storage location. One officer went to the public storage location and identified a storage unit with a lock that corresponded to a key obtained from Aruizu. Inside the unit, the officer found paperwork with Aruizu's name and date of birth. He also found what appeared to be "pay and owe" sheets listing the names of customers, their narcotics purchases (in grams), and what they owed. At trial, the officer opined that Aruizu possessed methamphetamine for sale. He based that opinion on the amount Aruizu possessed (which was far in excess of what even a very heavy user would consume), the cash found on his person, and the "pay and owe" sheets.

Aruizu's defense primarily disputed whether the prosecution had proven he possessed methamphetamine with the intent to sell. In closing arguments, defense counsel contended that the more reasonable conclusion based on the evidence was that Aruizu "had just purchased [methamphetamine] from his buyer and he had purchased in bulk because when you purchase in bulk, you get a better price." She stated, "You may not like that he's in possession of methamphetamine," but "[m]ere possession of a sellable

quantity of a controlled substance without an intent element is insufficient and legally not a crime."

DISCUSSION

Aruizu contends the court erred by admitting testimony that police officers had received a report of a Hispanic male with a German Shepherd dog involved in "narcotics activity" in an area of Carlsbad. He argues this testimony was inadmissible as a matter of state evidentiary law and federal constitutional law. We address each argument in turn.

Aruizu first argues this testimony was inadmissible under state evidentiary law because it was hearsay, not relevant to any issue in dispute, and substantially more prejudicial than probative. At trial, the prosecution contended that it was offering the testimony for a nonhearsay purpose, i.e., "the effect on the police officers that day and that they were behaving lawfully when they approached him for that purpose." The trial court agreed. Later, the parties entered into a stipulation that the officers' contact, detention, and search of Aruizu was lawful and proper. In light of that stipulation, defense counsel argued that the testimony about "narcotics activity" was irrelevant. The court disagreed. It stated, "I think you still need to explain why the officers were there" and "why the officers contacted this individual."

After the testimony was admitted, the court admonished the jury to consider it only for a limited purpose: "You are to consider that evidence for only one purpose and that is the purpose as to why the officers approached the [d]efendant and for no other purpose. You are to restrict your deliberations in this case to the evidence that you heard as to what happened on September 25th and not anything that happened before or any

other information that the police officers had before that date." In its jury instructions, the court again told the jury that "certain evidence was admitted for a limited purpose. You may consider that evidence only for that limited purpose and for no other."

We need not consider whether the court erred by admitting this evidence, either because it was irrelevant or because it was more prejudicial than probative, because we conclude Aruizu has not shown prejudice even if we assume error. State law evidentiary errors are reviewed under the *Watson* standard of prejudice. (*People v. Scheid* (1997) 16 Cal.4th 1, 21; see *People v. Watson* (1956) 46 Cal.2d 818, 836.) " 'Under the *Watson* standard, prejudicial error is shown where " ' "after an examination of the entire cause, including the evidence," [the reviewing court] is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.] '[Our Supreme Court has] made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' " ' " (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.) Aruizu bears the burden of showing prejudice. (See *People v. Garza* (2005) 35 Cal.4th 866, 881.)

In his appellate briefing, as at trial, Aruizu focuses on the lack of evidence supporting his intent to sell the methamphetamine in his possession. He points out there was no evidence of certain common indicia of drug dealing, such as scales, packing materials, or cell phones. There was also no evidence the handwriting on the "pay and owe" sheets had been matched to Aruizu. But, while these arguments could have been (and were) made to the jury, Aruizu does not explain how excluding the testimony about

"narcotics activity" would have affected the jury's assessment of the evidence and these arguments. The testimony in question was brief, the trial court admonished the jury to consider it only for the limited purpose of understanding why officers approached Aruizu, it was not mentioned in closing arguments, and it did not bear directly on the primary disputed issue—narcotics *sales*—in any event. Simple possession of methamphetamine is "narcotics activity"; a reasonable jury would not have interpreted the phrase as requiring sales. Moreover, ample evidence supported the finding that Aruizu possessed methamphetamine for sale, rather than personal use. Under these circumstances, Aruizu has not shown any reasonable probability, i.e., any reasonable chance, that he would have obtained a more favorable outcome if the testimony regarding "narcotics activity" had not been admitted. (See *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1110 [similar error held harmless where court admonished jury, the evidence was not critical, and it was mentioned only briefly in closing arguments].)

Aruizu claims the court's jury instruction was insufficient to cure any prejudice because it did not specifically tell the jury not to consider the testimony when deciding whether Aruizu possessed methamphetamine with intent to sell. We disagree. The instruction told the jury to consider the testimony "for only one purpose and that is the purpose as to why the officers approached the [d]efendant and for no other purpose." The jury could not reasonably interpret this instruction as allowing it to consider the testimony for purposes other than why the officers approached Aruizu. We presume the jury understood and followed this instruction. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Aruizu has provided no reason to abandon this presumption here.

We likewise find no grounds to reverse the judgment based on Aruizu's federal constitutional arguments. He claims the admission of the testimony violated the Sixth Amendment's Confrontation Clause. (See *Crawford v. Washington* (2004) 541 U.S. 36.) "The Sixth Amendment to the United States Constitution guarantees the accused in criminal prosecutions the right 'to be confronted with the witnesses against him.' In [*Crawford*], the high court held that this provision prohibits the admission of out-of-court *testimonial* statements offered for their truth, unless the declarant testified at trial or was unavailable at trial and the defendant had had a prior opportunity for cross-examination." (*People v. Livingston* (2012) 53 Cal.4th 1145, 1158.) However, "the high court in *Crawford* also made clear that this rule of exclusion applies only to testimonial *hearsay*; the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted'—that is, for nonhearsay purposes." (*People v. Hopson* (2017) 3 Cal.5th 424, 432; accord, *People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 6 ["*Crawford* made clear that there are no confrontation clause restrictions on the introduction of out-of-court statements for *nonhearsay* purposes."].)

The testimony here was explicitly offered for a nonhearsay purpose, i.e., to explain why police officers approached Aruizu. For that purpose, the truth of the out-of-court report that a person matching Aruizu's description was involved in "narcotics activity" was irrelevant. Whether it was true or not, the report is what prompted the officers to contact Aruizu. The jury was properly instructed on the testimony's limited purpose. Under these circumstances, the testimony was not offered for its truth and does not implicate the Confrontation Clause.

Aruizu does not directly address this argument. Instead, he focuses on rebutting the claim (which we need not consider) that the testimony was not hearsay because it did not convey the content of an out-of-court statement at all. Even assuming the testimony did convey the content of an out-of-court statement, it was offered and admitted for a nonhearsay purpose. The Confrontation Clause does not bar its use in this manner. Given this conclusion, we need not consider whether any Confrontation Clause error would be harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

GUERRERO, J.

WE CONCUR:

IRION, Acting P. J.

DATO, J.